No. 89-1430

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BILLY RAY APPERSON and DON APPERSON,
Individually And On Behalf Of A Class,
Petitioners,

v.

FLEET CARRIER CORPORATION; LOCAL NO. 614, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA; and FLEET CARRIER DEALERS SERVICE, a Michigan corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT TEAMSTER LOCAL 614's BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners' statement of the question misstates the findings and holding of the decision below. The court of appeals did not find that the arbitrator appeared to be biased. On the contrary, it merely recognized that federal statutes would have required an Article III judge to recuse himself from the case.

In the circumstances disclosed by the decision below, the question should be restated as follows:

> Would a reasonable person conclude that one of the arbitrators on a bi-partisan grievance panel was biased where he had been a law partner of one of the defense counsel years ago but had not worked on this case or even for this client before the split in the firm, had no personal knowledge of the dispute before the hearing, and had no financial interest in the grievance or this litigation?

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RESPONDENT TEAMSTER LOCAL 614's BRIEF IN OPPOSITION

The respondent, Local 614, International Brotherhood of Teamsters, respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's decision in this case. That decision is reported at 879 F.2d 1344 (1989).

STATEMENT OF THE CASE

This is a "hybrid" § 301 and duty of fair representation action in which petitioners have raised only one issue

in this Court: whether the award of an arbitration committee established by the parties' collective bargaining agreement should be set aside because of the alleged bias of one of the arbitrators. The arbitrator in question was a former law partner of one of the defense counsel in this case. However, both the court of appeals and the district court held that this past relationship, without more, did not establish "evident partiality" within the meaning of section 10(b) of the federal arbitration act, 9 U.S.C. § 10(b).

The grievance in question, filed by a Local 614 business representative, sought to set aside a prior settlement of a pay dispute that had arisen between owner-operators represented by defendant Local 614, International Brotherhood of Teamsters (Local 614) and their employer, defendant Fleet Carrier Corporation (Fleet), under their collective bargaining agreement, the National Master Automobile Transporters Agreement (NMATA). Appendix to Petition for Certiorari at page 9a.[1] Under the NMATA, grievances which were not resolved at earlier steps can be referred to a national grievance committee comprised of an equal number of employer and union appointees who are authorized to resolve the dispute by majority vote (4a). Local 614's grievance over the pay matter was presented to the national grievance committee in February 1986. This lawsuit, filed against Fleet by two of its owner-operators in February 1982, had been filed as a result of the earlier settlement and was still pending (7a).

The employer-side co-chair of the national committee was Ian Hunter, who is a partner of A. Read Cone, the attorney that has represented Fleet in this action from its inception (10a). When Local 614's grievance came up, Hunter voluntarily stepped aside as employer co-chair because committee members must be unrelated to the

[1] Subsequent citations to this Appendix will be denoted as (—a).

parties in the grievance. (*Id.*) Pursuant to committee rule, he appointed Robert Parr, his former law partner, as employer-side co-chair for the grievance (*Id.*). More particularly, both Hunter and Cone had been partners with Parr in the "Matheson Firm" until mid-1983 when Cone and Hunter left that firm, in which Parr is still a named partner (*Id.* at fn. 7). The court of appeals, reversing the district court on this point, found that plaintiff Billy Ray Apperson had preserved an objection to Parr's participation in the national committee's proceedings on partiality grounds because until mid-1983 Parr had been law partners with Hunter and Cone (35a).[2]

However, both of the courts below found that plaintiffs had not met their burden of establishing "specific facts" showing Parr's bias.[3] Rather, because Parr had not personally represented Fleet and because his firm had not represented Fleet for more than two years before the national grievance committee hearings, the district court found it unlikely that a "reasonable person would conclude" that Parr was "evidently partial" (50a-51a). The court of appeals went even further, noting the lack of evidence: (1) that Parr had ever worked on this case or had any "personal interest in or knowledge of the brokers' [owner-operators] original grievance or this lawsuit" before his appointment as co-chair; (2) that "Parr

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[2] This case was decided on summary judgment after the conclusion of years of discovery. According to plaintiff Billy Ray Apperson's fifth affidavit, he was permitted to hand out and read his prepared statement challenging the company co-chair to the national committee. Sixth Circuit Joint Appendix, vol. III at 571A. His affidavit also acknowledges that he was permitted to speak to the committee on his own behalf (*Id.*). Thus, not even plaintiff's affidavit supports opposing counsel's statement in the petition at page 11 that Parr "refus[ed] to acknowledge Apperson at the hearing".

[3] The burden of proving facts which would establish the evident partiality of an arbitrator "rests squarely on the party challenging the award." *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982); *Sheet Metal Workers Int. Assoc. v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir. 1985).

has ever personally performed legal services for Fleet"; and (3) that Parr had any "financial interest in the grievance or this litigation". The court of appeals also cited the fact that Parr's partnership with Cone and Hunter had "terminated over two and one-half years" before the national committee's decision (31a).

REASONS WHY THE PETITION SHOULD BE DENIED

No special and important reasons for granting the petition for writ of certiorari exist in this case as required by Rule 10.1 of this Court. The decision below comports with applicable precedent of this Court and does not conflict with those of other courts of appeals. As we shall show, neither this Court nor any court of appeals has held that an appearance of bias sufficient to cause a federal judge's recusal constitutes "evident partiality" under the federal arbitration act, and all appear to apply the reasonable person standard or its substantial equivalent adopted by the court below.

I. THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT OR SHOULD BE SETTLED HERE BY DECISION.

Section 10(b) of the United States Arbitration Act, 9 U.S.C. § 10(b), provides that a court may, upon the "application of any party to the arbitration", vacate an award "where there was evident partiality or corruption in the arbitrators". In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148-150 (1968), a majority of this Court held that an arbitrator was biased in fact because of financial interest. A plurality of this Court construed section 10 to require that arbitrators meet or exceed the ethical standards of federal judges and avoid "even the appearance of bias". That statement has been treated as *dictum* by the courts of appeals because the concurrence by Mr. Justice White

and Mr. Justice Marshall, whose votes were essential to the decision, expressly abjured any ruling that "arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges." *Id.*, 393 U.S. at 150. The concurring justices reasoned that arbitrators are often effective because of their connections to the marketplace and therefore should not be disqualified by a past business relationship with one of the parties. *Id.*

There is good reason to question whether the "evident partiality" provisions of section 10, however they be interpreted, even apply to arbitrations under a collective bargaining agreement. In *United Paperworkers v. Misco*, 484 U.S. 29, 40 (1987), this Court noted that

> The Arbitration Act does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases. . . .

Labor arbitrators, of course, operate under a separate framework of federal law of which section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173 (d), is the linchpin:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Under § 203(d) it is "not arbitration per se that federal law favors, but rather final adjustment of differences by a means selected by the parties", whether it be arbitration or "a procedure other than arbitration".[4] As the district court noted, members of grievance arbitration committees under this collective bargaining agree-

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[4] *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096-97 (3rd Cir. 1977); *General Drivers Local 89 v. Riss & Co.*, 372 U.S. 517, 519 (1963).

ment, like members of systems boards under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, are employer and union representatives and the panel is bipartisan rather than impartial and disinterested.[5] It is inappropriate to resolve an issue of construction of the federal arbitration act in a case where its standards are utilized only for guidance and the interplay of other more particularized statutes must also be considered.

Even were this a case where section 10 applied *ex proprio vigore*, the decision below does not depart from prior decisions of this Court or raise an important issue for its decision. The "neutral" third arbitrator in *Commonwealth Coatings* had failed to disclose that one of the parties had been a recent and regular customer of his consulting firm, which had received approximately $12,000 over the past four or five years from this customer and had performed services for it on the very projects involved in the dispute. It was this on-going and undisclosed business relationship which convinced the concurring justices that there was "evident partiality". 393 U.S. at 151-52.

Here, in contrast, the court of appeals found that the arbitrator in question, although a law partner years before with one of the defense counsel, had had no prior involvement with this client or this case, had no prior personal knowledge of this dispute, and had no financial interest in the grievance or this litigation (31a). Clearly, in such circumstances the arbitrator's past relationship fell far short of showing "evident partiality" as measured by this Court's precedent.

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[5] According to the district court (48a), members of system boards under the Railway Labor Act are measured by a "lessened standard of partiality" because members of such boards are "not in legal contemplation" or in fact supposed to be neutral arbitrators. They are carrier and labor organization representatives. The board is bipartisan rather than impartial and disinterested", citing, *Arnold v. United Airlines, Inc.*, 296 F.2d 191, 195 (7th Cir. 1961).

II. NO CONFLICT OF THE CIRCUITS EXISTS WHICH SHOULD BE RESOLVED BY REASON OF THE DECISION BELOW.

The decision below neither creates nor reflects a conflict in circuits. Virtually all circuits that have faced the issue have rejected petitioners' contention that an appearance of bias sufficient to cause the recusal of a federal judge constitutes evident partiality under section 10. The Second,[6] Seventh[7] and Ninth[8] circuits have all held that the concurring opinion by Mr. Justice White and Mr. Justice Marshall in *Commonwealth Coatings* states the law in this regard.[9] These circuits, and now the Sixth

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[6] *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 551 (2d Cir.), *cert. den.*, 451 U.S. 1017 (1981) [§ 10 standard does not include "appearance of bias"]; *Morelite Constr. Corp. v. N.Y.C. District Council of Carpenters*, 748 F.2d 79, 83 (2d Cir. 1984) [§ 10 standard "less stringent than those for federal judges"]; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173-174 (2d Cir. 1984) ["mere appearance of bias that might disqualify a judge will not disqualify an arbitrator"]; *Pitta v. Hotel Assoc. of New York City*, 806 F.2d 419, 423 (2d Cir. 1986) [same].

[7] *Merit Insurance v. Leatherby Insurance Co.*, 714 F.2d 673, 682 (7th Cir.), *cert. den.*, 464 U.S. 1009 (1983) [§ 10 standard "less exacting than the one governing judges"]; *Tamari v. Bache Halsey Stuart Inc.*, 619 F.2d 1196, 1200 (7th Cir.), *cert. den.*, 449 U.S. 873 (1980) [showing too speculative whether actual or merely appearance of bias is the standard].

[8] *Sheet Metal Workers Int. Ass'n v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985) ["appearance of bias, standing alone, is insufficient"]; *Toyota of Berkeley v. Automobile Salesmens' Union, Local 1095*, 834 F.2d 751, 755 (9th Cir. 1987), *cert. den.*, —— U.S. ——, 108 S. Ct. 2036 (1988) [facts must "create a reasonable impression of partiality"; district court reversed for holding arbitrator to standard of Article III judges].

[9] Applying *Commonwealth Coatings* in a manner consistent with its sister circuits, the Tenth Circuit in *Ormsbee Development Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir.), *cert. den.*, 459 U.S. 838 (1982), held that "it is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award. [Citation omitted]. For an award to be set aside, the existence of bias or interest of an arbitrator must be direct, definite

Circuit as well, all apply the Second Circuit's "reasonable person" standard [10] or something very close to it.[11] Thus, there is no conflict in the circuits warranting review by this Court of the decision below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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and capable of demonstration rather than remote, uncertain or speculative."

[10] *Morelite*, 748 F.2d at 84: "evident partiality" is "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."

[11] *Merit Ins.*, 714 F.2d at 681, 682: circumstances must be "such that a man of average probity might reasonably be suspected of partiality" and "powerfully suggestive of bias"; also, the standard is "objective"; *Toyota of Berkeley*, 834 F.2d at 756: facts must "create 'reasonable impression of partiality'."